SHOEMAKER *v.* SHOEMAKER *et al.*

Nov. 16, 1911.

[72 S. E. 684.]

1. Bonds (§ 128*)—Action—Burden of Proof.—On plea of non est factum in a suit on a bond, plaintiff has the burden of showing genuineness of the signature.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 205-217; Dec. Dig. § 128.*]

2. Equity (§ 378*)—Issues of Fact—Jury Trial.—Where suit on a bond involved the credibility of witnesses, and the proof was very conflicting as to the genuineness of the bond, it was error not to order a jury trial on the trial court's own motion.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 794-799; Dec. Dig. § 378.*]

Appeal from Circuit Court, Russell County.

Bill by B. H. Shoemaker, assignee, against A. D. Shoemaker, administrator, and others. From a decree dismissing the bill, plaintiff appeals. Reversed.

W. W. Bird, for the appellant.
Finney & Willson, for the appellees.

CARDWELL, J. The controversy involved in this appeal is with respect to a bond alleged to have been executed on the 1st day of August, 1908, by James M. Shoemaker, who it appears resided in Russell county, Va., was never married, and had accumulated some property. His nearest relatives and heirs at law were four brothers, one sister, and two nephews, children of a deceased brother; one of the brothers, Isaac Shoemaker, being a resident of Scott county, Va., whom James M. Shoemaker had been in the habit of visiting at irregular intervals, his visits being sometimes prolonged as much as two weeks or more. It is claimed by appellant that, while on a visit to his brother Isaac, the bond here in question for $1,077, payable one day after its date, was executed by James M. Shoemaker to B. H. H. Shoemaker, a son of Isaac Shoemaker, and by B. H. H. Shoemaker assigned to appellant, another son of Isaac Shoemaker.

James M. Shoemaker died intestate at his home in Russell county in September, 1908, but a short time after the date of said bond, and A. D. Shoemaker was duly appointed and qualified as his administrator. Some time after the death of James M. Shoemaker, appellant presented the said bond to said admin-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

istrator for payment, which was refused, although the bond had been approved and allowed by the commissioner of accounts for Russell county as a debt against the estate of James H. Shoemaker, deceased; but whether payment was refused because of the want of sufficient personal assets of said decedent's estate to pay it, or for what reason, does not appear and is not material. Payment of the bond having been refused, appellant filed his bill in this cause against the administrator and heirs at law of James M. Shoemaker, deceased, the purpose of which was to enforce its payment out of the personal assets in the administrator's hands, if sufficient, and, if not, out of the proceeds of the sale of the real estate owned by James M. Shoemaker at his death.

To the bill the administrator filed a separate answer, some of the other defendants their joint and several answers, and at the same term of the court two of the defendants filed their plea of non est factum, verified by their affidavits. The answers set up as a defense want of consideration and the incompetency of James H. Shoemaker to dispose of his estate at the time the said bond purports to have been executed; but defendants offered no evidence in support of either of those defenses, and the case was litigated and finally determined by the circuit court upon the plea of non est factum interposed by two of the defendants, the decree of the court being adverse to appellant, and his bill was dismissed.

[1] There was some evidence, brought out by appellees in the conduct of the case upon their cross-examination of witnesses for appellant, tending to show that there was no consideration for the execution of the bond in controversy; but it is conceded here that the plea of non est factum presents the only defense relied upon by appellees. The question, therefore, presented on this appeal, is whether or not the appellant has successfully carried the burden, cast upon him by the plea of non est factum, of proving the genuineness of the signature of James M. Shoemaker to the disputed bond.

[2] We shall not go into a discussion of the evidence, further than to say that it involves not only the credibility of witnesses, but the charge of both forgery and perjury on the part of some of the witnesses who have testified in the case; and the proof is not, in our opinion, sufficiently definite and certain to satisfy us that the ends of justice have been attained by the decree complained of. With the strong circumstances, both favorable and adverse to the genuineness of the bond, appearing from the depositions taken and considered at the hearing of the case, it is one peculiarly for a jury, and the error of the court was in not ordering of its own motion an issue out of chancery. Wherefore, in order that the subject may be more fully investigated,

the decree of the circuit court will be reversed, and the cause remanded, with directions that a jury be impaneled to try and determine at the bar of the court the issue of fact involved, viz., whether or not the signature of James M. Shoemaker to the disputed bond is genuine; and upon the trial of that issue before the jury, the burden of proving the genuineness of the signature in question shall be upon the appellant.

Reversed.

MOON *et al. v.* CHILDREN'S HOME SOCIETY OF VIRGINIA.

Nov. 16, 1911.

[72 S. E. 707.]

Infants (§ 13*)—Custody—Guardianship—"Colored Person."—Acts 1901-02, c. 137, § 29, provides that when any minor child under 14, by reason of neglect, crime, or other vice of the parents, is growing up without education or salutary control, and in circumstances exposing it to a vicious life, the child may be committed to the care of the Children's Home Society. Held, that where minor daughters of a mother of gentle birth were not neglected, but were comfortably cared and provided for by their mother, and their stepfather, and it did not appear that from neglect or any vice of the mother or her husband the children were growing up without education or salutary control, and in circumstances exposing them to a vicious life, the mere fact that their mother married for her second husband one who had less than one-fourth negro blood in his veins, and was therefore not a "colored person," within Code 1904, §§ 2252, 2253, 3783, 3788, defining a colored person as one having one-fourth or more colored blood in his veins, and prohibiting such a person from intermarrying with a white woman, was insufficient to justify the commitment of the children to the custody of the society.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 2, pp. 1274, 1275.]

Error to Circuit Court, Albemarle County.

Madeline Grasty and Ruby Grasty, minor children of Lucy Moon, having been committed to the Children's Home Society of Virginia, she brings error. Reversed and rendered.

Geo. E. Walker, for the plaintiff in error.

S. S. P. Patteson, for the defendant in error

---

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.